

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

v.

Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN
GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

**BRIEF IN SUPPORT OF MOTION FOR REVIEW BY THREE-JUDGE COURT OF
JUDGE STADTMUELLER'S ORDERS OF DECEMBER 8, 2011, AND DECEMBER 20,
2011, PURSUANT TO 28 U.S.C. § 2284(c)(3)**

Non-parties, the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald (the "Legislature"), submit this Brief in Support of Their Motion for Review by the Three-Judge Court of Judge Stadtmueller's Orders of December 8, 2011 (dkt. # 74) ("December 8 Order"), and December 20, 2011 (dkt. # 82) ("December 20 Order") (collectively the "Orders"), as to the scope of discovery that may be permitted of the consulting expert retained by outside counsel for the Legislature, Joseph Handrick ("Mr. Handrick").

INTRODUCTION

During the redistricting process following the 2010 decennial census, Mr. Handrick was retained as a non-testifying expert consultant to assist the Legislature and its legal counsel with the task of creating state legislative and federal congressional districts that comply with constitutional and statutory requirements. Although Mr. Handrick was a specially retained consultant on matters relating to redistricting, and although Mr. Handrick consulted with legal

counsel on behalf of the Legislature, Judge Stadtmueller ruled that neither the legislative privilege nor the attorney-client privilege shielded from disclosure Mr. Handrick's actions or communications with counsel or the Legislature. The December 20 Order held that the Legislature (rather than outside counsel) retained Mr. Handrick's services and therefore no privilege exists.

This was in error. At a minimum, the Legislature is entitled to invoke either the attorney-client privilege (if Mr. Handrick is deemed a member of the legal team) or the legislative privilege (if Mr. Handrick is deemed a member of the legislative team). Arguably, both privileges apply. Respectfully, the Orders took these two existing privileges and essentially concluded that, because they were combined, the result was that no privilege existed. The Legislature asks that the full court review the Orders and conclude that any acts or communications of Mr. Handrick that would be privileged if personally performed by the Legislature should be privileged and shielded from discovery; and any communications that Mr. Handrick had with legal counsel related to legal counsel's provision of legal services to the Legislature be deemed privileged and shielded from discovery.

FACTUAL BACKGROUND.

As this Court is aware, this lawsuit involves various constitutional and other legal challenges to Wisconsin's redistricting efforts following the 2010 decennial federal census, which were enacted into law as Acts 43 (reapportionment of State legislative districts) and 44 (reapportionment of Wisconsin's congressional districts). (Dkt. # 58). According to the Second Amended Complaint, Plaintiffs are citizens, residents, and qualified voters of the United States and the State of Wisconsin. (Dkt. # 58, ¶ 5). Named as defendants were members of Wisconsin's Government Accountability Board, the governmental entity entrusted with implementing Acts 43 and 44.

The non-parties bringing this motion, the Wisconsin State Senate and the Wisconsin State Assembly, were not named as defendants in this action. (*See generally* Dkt. # 58). The Legislature hired outside counsel to assist it in drafting Acts 43 and 44. (Dkt. # 78, ¶ 1). Outside counsel, in turn, hired consultants to assist it in providing legal advice to the Legislature. (*See, e.g.,* Dkt. # 78, Ex. 1). Mr. Handrick was one such expert consultant assisting counsel. (*Id.*)

Mr. Handrick is a government relations specialist with the law firm of Reinhart Boerner van Duren, who had been retained by outside counsel for the Legislature to assist legal counsel in counsel's provision of legal services related to the Legislature's redistricting efforts. (Dkt. # 78, Ex. 1). In that capacity, Mr. Handrick testified that his role was as follows:

In legal counsel's role of providing advice and counsel to the legislature on adoption of a -- or development of a redistricting map following the 2010 census, they would give, give constitutional and other legal advice regarding redistricting. And they tasked me with helping translate that legal advice into tangible work products or assist them in the creation of tangible work products for their clients.

(December 23, 2011 Declaration of Joseph Louis Olson (Hereinafter "Olson Decl."), Ex. 1, pg. 85). Specifically, Mr. Handrick was proficient in a highly-specialized type of software used in the redistricting process called autoBound. (Olson Dec., Ex. 1, pg. 24). Mr. Handrick performed these responsibilities at the offices of Michael Best under the supervision of at least four different attorneys. (Olson Dec., Ex. 1, pg. 30). These facts are undisputed.

On November 28, 2011, Plaintiffs served a subpoena on Mr. Handrick demanded compliance by December 1, 2011. (Dkt. # 64, Ex. 1). The subpoena demanded that Mr. Handrick provide documents as follows: "Provide any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44." (*Id.*).

Two days later, the Legislature moved to quash the subpoena pursuant to Federal Rule of Civil Procedure 45. (Dkt. # 63). Plaintiffs opposed the motion. (Dkt. # 71). On December 8, 2011, Judge Stadtmueller issued an order denying the motion to quash. (Dkt. # 74). In denying the motion to quash, Judge Stadtmueller concluded that no privilege applied to Mr. Handrick: no legislative privilege; no attorney-client privilege; and no work-product privilege. Judge Stadtmueller relied heavily on *Committee for a Fair & Balanced Map v. Illinois State Board of Elections*, 2011 U.S. Dist. LEXIS 117656, *24 (N.D. Ill., Oct. 12, 2011) (hereinafter, “*Fair Map*”) to conclude that, because Mr. Handrick was an outside consultant who participated in the legislative process, the Legislature waived any legislative privilege that may have applied. (Dkt #74 at 3–4). In so doing, Judge Stadtmueller mistakenly noted that Mr. Handrick was (1) an attorney (2) who was employed by the Legislature’s outside counsel, Michael Best & Friedrich. (*Id.* at 2).

The Legislature moved for clarification of Judge Stadtmueller’s order to determine the scope of discovery that should be allowed of Mr. Handrick, correcting the Court’s assumption as to who Mr. Handrick’s employer was and what his role was in the redistricting process, as the Court’s order was premised, at least in part, on such facts. (Dkt. # 77). In support, the Legislature submitted three letters that set forth the terms of the engagement of Mr. Handrick. (Dkt. # 78, Exs. 1–3).

Judge Stadtmueller granted the motion insofar as he agreed that Mr. Handrick was not an attorney and was not employed by Michael Best & Friedrich. (Dkt. # 82 at 8). However, in all other regards, the Court denied the motion for clarification and reiterated that no privilege applied to any communications with or documents held by Mr. Handrick. (*Id.*). Judge Stadtmueller arguably extended his prior ruling, and the resulting order that communications

between legal counsel and Mr. Handrick were not privileged calls into doubt whether communications between attorney and client (the Legislature) are privileged if held in Mr. Handrick's presence, even though Mr. Handrick was expressly retained as a consultant who falls within the privilege. (*Id.*)

Respectfully, the Orders misapply of the law of attorney-client privilege and legislative privilege. Mr. Handrick is protected by both. As such, the Legislature requests that this Court conclude that (1) Mr. Handrick's communications with the Legislature and its legal counsel in his role as a legislative consultant be shielded from discovery by the legislative privilege; (2) Mr. Handrick's communications with legal counsel in the furtherance of counsel's provision of legal services to the Legislature be shielded from disclosure by the attorney-client privilege; and (3) documents created in the scope of the engagement be protected by the from disclosure under the work product doctrine.

LEGAL STANDARD

As the Court is aware, redistricting cases such as this are decided by a three-judge district court. 28 U.S.C. § 2284(a). Any single judge may make pretrial orders during the case, as Judge Stadtmueller has done in this case. § 2284(b)(3). However, "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment." *Id.* In order for an order to be considered to have been issued by the full, three-judge court, it must be signed by all members of the court. *See Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com.*, 260 U.S. 212, 218 (1922) (in determining whether an action was one taken by a full three-judge court under Jud. Code § 266, "assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct"). Here, the orders at issue were signed only by Judge Stadtmueller. *Cf.*

Fair Map, supra, *37 (order signed by all three members of the court). As such, the orders are subject to review by the full court.

Whether a privilege applies is a legal question, which is reviewed *de novo*. *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2009). Thus, the privilege determinations in the Orders are subject to *de novo* review by the full court.

ARGUMENT

I. The Determination That the Attorney-Client Privilege Did Not Apply to Communications Between Mr. Handrick and Outside Legal Counsel Was In Error.

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011). “The objectives of the attorney-client privilege apply to governmental clients.” *Id.* at 2320. “[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients ...[and] encourages observance of the law and aids in the administration of justice.” *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 347 (1985). “It is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship.” *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982). “An independent judiciary and a sacrosanct confidential relationship between lawyer and client are bastions of ordered liberty.” *The Attorney-Client Privilege and the Work-Product Doctrine*, 4 (5th Ed. ABA Publishing).

Communications are subject to the attorney-client privilege when: (1) made to the attorney in confidence; (2) not intended to be disclosed by the attorney; and (3) made for the purpose of obtaining legal advice. *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003). No party disputes that confidential communications between Michael Best lawyers and their clients in the Legislature are cloaked in the “sacrosanct privacy of the attorney-client

relationship.” Rather, the question is whether that privilege extends to Mr. Handrick, a consulting expert hired to assist Michael Best lawyers in connection with its representation of the Legislature.

The Seventh Circuit has adopted the *Kovel* Doctrine—named after seminal case *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)—which provides that statements made to a consulting expert of an attorney are subject to the attorney-client privilege “so it is as if the communication was to the attorney himself.” *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979)(citing *Kovel*, 296 F.2d at 921–22). “It has never been questioned that the privilege protects communications to the attorney's . . . agents . . . for rendering his services” *Id.* (quoting Wigmore, Evidence § 2301 at 583 (McNaughton rev. 1961)). “[I]n contrast to the Tudor times when the privilege was first recognized, . . . the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others....” *Kovel*, 296 F.2d at 921.

Here, the evidence in the record shows that Michael Best hired Handrick to assist the firm in representing the Legislature:

This letter confirms our engagement of Joseph W. Handrick as a consultant ***in connection with our representation*** of the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald (the “Client”) in the above matter, which involves potential litigation.

Mr. Handrick will be providing consultation on Wisconsin demographic matters ***and will perform those services as directed by us and other counsel in connection with our provision of legal services to the Client.***

While this retention is directed to you by this office, the sole responsibility for payment of amounts due to you rests with the Client. You will be paid \$5,000 per month, beginning as of the date this engagement letter is executed and continuing through May, 2012, or until this retention is terminated, whichever comes sooner.

(Dkt. # 78, Ex. 1).

Nevertheless, the December 20 Order stated that:

the Legislature hired Mr. Handrick and, therefore, consulted him independently, as opposed to Michael Best having consulted him. In the engagement letter sent by Reinhart to Michael Best, Reinhart states that it is the firm's understanding that Mr. Handrick's "clients are the Wisconsin State Senate . . . and State Assembly."

(Dkt. # 82 at 7).

The December 20 Order appears to reason that if the Legislature was Mr. Handrick's ultimate client, the Legislature, rather than Michael Best, must have "hired" him. As discussed below, even if the December 20 Order were correct on this point, the Legislature is still entitled to invoke the legislative privilege over Mr. Handrick's work-product. In any event, the engagement letter correctly identifies the ultimate client as the Legislature. This does not vitiate Mr. Handrick's duties to assist Michael Best. Rather, the engagement makes clear that the ultimate client in this representation is the Legislature. Accordingly, Mr. Handrick's ethical duties of, among other things confidentiality, run to the Legislature. This has very practical consequences. Under Wisconsin law, the "attorney-client privilege belongs to the client," and only the client can waive it. *Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust*, 271 Wis. 2d 610,619, 679 N.W.2d 794 (2004). Thus, it is critical that a consultant hired by a law firm to assist that firm in rendering legal advice to its client understand who that client is. If Michael Best were identified as the "client" in the engagement letter, it would create the misperception that Mr. Handrick owed duties only to Michael Best and that Michael Best could waive privilege and make public Mr. Handrick's work-product without the consent of the Legislature. Moreover, Mr. Handrick must understand who the ultimate client is in order to recognize any potential conflicts of interest that might arise, and understand that his obligations with respect to any conflicts of interest run to the client and do not stop at Michael Best.

The December 20 Order also appears to rely on the fact that the Legislature is ultimately responsible for paying Mr. Handrick’s consulting fee. This, too, is a run-of-the-mill arrangement between a lawyer and client. Of course the client is ultimately responsible for paying for the consultants that assist its attorneys. The Legislature is unaware of any authority that would destroy the sacrosanct attorney-client privilege on the basis that an engagement letter acknowledges the client’s obligation to pay its bills with respect to consulting experts.¹

None of this in any way undercuts the stated purpose of the engagement: “providing consultation on Wisconsin demographic matters . . . as directed by [Michael Best] and other counsel in connection with our provision of legal services to the Client.” Mr. Handrick’s deposition testimony corroborates the engagement letter:

In legal counsel’s role of providing advice and counsel to the legislature on adoption of a—or development of a redistricting map following the 2010 census, they would give, give constitutional and other legal advice regarding redistricting. And they tasked me with helping translate that legal advice into tangible work products or assist them in the creation of tangible work products for their clients.

(Olson Decl., Ex. 1, pg. 85). Specifically, Mr. Handrick was proficient in using a highly-specialized type of software used in the redistricting process called autoBound. (Olson Decl., Ex. 1, pg. 24). Mr. Handrick also participated in the two previous redistricting efforts. (Olson Decl., Ex. 1, pg. 71). Mr. Handrick used his knowledge of autoBound and his experience in two previous redistrict efforts to among other things:

- insure minimum population deviation for new districts (Olson Decl., Ex. 1, pg. 97);

¹ The December 20, 2011 Order cites the case *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 302 (D. Md. 1992), for the proposition that “[i]f the Legislature was the client paying Mr. Handrick—a non-lawyer—then his opinions and conclusions are not subject to any work-product or attorney-client privilege.” (Dkt. # 82 at 3). However, a careful review of that case shows that the issue of “who” is ultimately responsible for paying the consultant is never discussed.

- preserve, to the extent possible and practicable, the core population of prior districts as well as communities of interest (*Id.*);
- insure that the new redistricting maps, to the extent possible, kept wards and municipalities whole within legislative boundaries and to the extent possible recognize local government boundaries (Olson Decl., Ex. 1, pp. 97–98).

Mr. Handrick performed these responsibilities at the offices of Michael Best at the direction of and under the supervision of at least four different attorneys. (Olson Decl., Ex. 1, pp. 30, 42, 131–32).

The December 20 Order also relies on *Marylanders* for the proposition that “[c]ertainly, if...[a consulting expert] was an active participant in the events which form the subject matter of this litigation, they are entitled to whatever discovery of him they may deem appropriate.” (Dkt. # 82 at 7) (*Marylanders*, 144 F.R.D. at 303). The Legislature is unaware of an “active participant” exception to the attorney-client privilege or even what the phrase “active participant” means in this context. The court in *Marylanders* cites no authority for this proposition, and until the December 20 Order no other court (in almost 20 years) has cited *Marylanders* for this principle. Indeed, this would be a very surprising result considering lawyers are frequently “active participants” in “events which form the subject matter of ... litigation” including, for example, drafting contracts that are subsequently challenged. Lawyers, as trusted advisors, are expected to be “active participants” in their clients’ decision-making. This is not a basis to disregard the sacrosanct attorney-client privilege. The question here is whether Mr. Handrick is a consulting expert retained by Michael Best to assist in furnishing legal advice to its client. If the answer is “yes”—and the answer *is* “yes”—then the privilege between

Michael Best and the Legislature extends to Mr. Handrick irrespective whether the Legislature's lawyers were deemed "active participants" in the subject matter of this case.²

Moreover, to the extent that the December 20, 2011 Order rests on its conclusion that Mr. Handrick acted as a "lobbyist" in the redistricting efforts, this conclusion is incorrect and unsupported by the facts in the record. Although Mr. Handrick is registered as a lobbyist, he was acting as a consulting expert in this matter and not as a lobbyist. Private interests hire lobbyists to try to persuade political decision makers, often a legislature. Here, the Legislature was ultimately responsible for paying for Mr. Handrick's work in consulting to the Legislature's outside counsel. Put simply, the December 20 Order posits that the Legislature paid Mr. Handrick to lobby itself. This conclusion is unsupported by any evidence.

Finally, the December 20 Order relies upon *Evans v. City of Chicago*, 231 F.R.D. 302, 310 (N.D. Ill. 2005), for the proposition that "'advice on political, strategic or policy issues...would not be shielded from disclosure by the attorney-client privilege.'" However, *Evans* involved a painstaking *in camera* review of individual attorney emails, concluding that particular documents were not created for the purpose of legal advice. The December 20 Order, on the other hand, makes a blanket, sight-unseen pronouncement that nothing "passed between Mr. Handrick and the Legislature's outside counsel" could possibly be privileged. (Dkt. # 82 at 6). The December 20, 2011 Order reasoned that "[c]onsidering Mr. Handrick's lack of any legal qualifications, the Court is unsure why he would be offered any documents other than those containing such advice." (*Id.*) This too, is mere conjecture that is not supported by the evidence.

² Another troubling aspect of the purported "active participant" exception is that the court in *Marylanders* articulates no legal test to determine whether an individual is an "active participant" in a subject matter of litigation. As a practical matter, trying to draw a line regarding when advice or consultation becomes "too active" to be entitled to privilege is unworkable.

The evidence shows that Mr. Handrick has a highly specialized skill set and is recognized as an expert in redistricting map drawing. Mr. Handrick's services implicate constitutional and statutory issues—legal issues (not political ones) that are actually being litigated in this case. Michael Best utilized his expertise to advise its clients on the constitutional implications of the redistricting efforts and therefore the Legislature is entitled to invoke attorney-client privilege over Mr. Handrick's communications with its outside counsel.

II. The Determination That the Legislative Privilege Did Not Apply to Mr. Handrick.

A. The Legislative Privilege Applies to State Legislators, Aides, and Consultants Retained to Assist Legislators in Their Legislative Functions.

State legislators enjoy a legislative privilege that shields them from producing documents in certain cases. *Committee for a Fair & Balanced Map v. Illinois State Board of Elections*, 2011 U.S. Dist. LEXIS 117656, *24 (N.D. Ill., Oct. 12, 2011) (hereinafter, "*Fair Map*"). This privilege applies to legislative aides, who are necessary to enable the legislator to fulfill his or her duties. *Id.* at **30-31, 34. And, contrary to the Orders, the privilege applies to legislative consultants in appropriate cases. *See ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058, *19 (E.D. N.Y., Sept. 25, 2007) ("*ACORN I*"); *ACORN v. County of Nassau*, 2009 U.S. Dist. LEXIS 82405, *4 (E.D. N.Y., Sept. 10, 2009) ("*ACORN II*"); *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1097–98 (Ariz. Ct. App. 2003).

The legislative privilege protects documents “created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides.” *John & Jane Doe I-36 v. State of Nebraska*, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *8 (D. Neb., April 19, 2011); *see generally City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (“The

Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task.”)

The privilege exists due to a recognition that disclosure of such private communications would both chill legislative debate and “discourage earnest discussion within governmental walls.” *Fair Map*, 2011 U.S. Dist. LEXIS 117656, *31. “[T]he need for confidentiality between lawmakers and their staff is of utmost importance. Legislators face competing demands from constituents, lobbyists, party leaders, special interest groups and others. They must be able to confer with one another without fear of public disclosure.” *Id.* *30.

There is a split of authority as to whether the legislative privilege is absolute or qualified. *See Kay v. City of Racho Palos Verdes*, 2003 U.S. Dist. LEXIS 27311, *36–38 (C.D. Cal, Oct. 10, 2003). The Seventh Circuit does not appear to have addressed the issue, although a three-judge district court within this circuit recently concluded that the privilege is a qualified one. *See Fair Map, supra*, **21-22.

Those courts that have determined that the privilege is qualified apply a five-factor balancing test to determine whether the policies justifying the legislative privilege outweigh the need for the discovery:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Id., *25.

Notably, the court in *Fair Map*, faced with a lawsuit raising claims nearly identical to those at issue in this case,³ found that the balance of the factors favored applying the privilege as

³ In *Fair Map*, the plaintiffs alleged that “the 2011 Map violates the Voting Rights Act of 1965, 42 U.S.C. § 1973 (“VRA”) (Count I), the Fourteenth Amendment (Count II) and the Fifteenth

to “information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers to draw the 2011 Map.” *Id.* *33.

B. Balancing Test Favors Maintaining the Privilege.

Here, as in many cases to consider the issue, the balance of factors favors the privilege. *ACORN I*, 2007 U.S. Dist. LEXIS 71058, ** 10–12. This includes the *Fair Map* case of which the December 8 Order admonished the Legislature to be mindful. Even if a number of the balancing factors otherwise favor disclosure, courts have concluded that the *weight* of the factors favoring non-disclosure (namely, the role of the government and the possible chilling effect on legislators of ordering disclosure) were more substantial than the weight of factors in favor of disclosure. *See Kay*, 2003 U.S. Dist. LEXIS 27311, *65 (extending legislative privilege communications involving city planners).

Fair Map’s factor-balancing analysis is particularly relevant here, since the nature of the claims in the two cases is largely the same. *See Fair Map, supra*, *5.

As to the first two factors, relevance and availability of other evidence, the court in *Fair Map* concluded that they favored non-disclosure: the court found that the evidence, although relevant, “is not central to the outcome of this case”; and “the availability of other evidence favors non-disclosure.” *Id.* *29. As in that case, public hearing minutes, statements made by lawmakers during debate, committee reports, press releases, newspaper articles, census reports, registered voter data, and election returns are all publicly available to the Plaintiffs. *See id.*

The last factor, and the weightiest, also favors nondisclosure here, as it did in *Fair Map*: “the need to encourage frank and honest discussion among lawmakers favors nondisclosure.” *Id.*

Amendment (Count III) by diluting the voting strength of Latino voters. Plaintiffs also claim that the 2011 Map constitutes an impermissible racial gerrymander in violation of the Fourteenth Amendment (Count IV) and a partisan gerrymander in violation the First Amendment (Count V) and Fourteenth Amendment (Count VI).” 2011 U.S. Dist. LEXIS 117656, *5.

Here, as in that case, “Legislators negotiated the law in private and debated it in public.” *Id.* *30.

As the court noted, “the need for confidentiality between lawmakers and their staff is of utmost importance. . . . They must be able to confer with one another without fear of public disclosure.”

Id.

Failure to protect confidential communications between lawmakers and their staff will not only chill legislative debate, it will also discourage “earnest discussion within governmental walls.” . . . In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law. This type of legislative horse trading is an important and undeniable part of the legislative process.

Id. **31-32(citing *Doe*, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *6).

As in *Fair Map*, the balance of factors in this case favors non-disclosure and upholding the legislative privilege as to confidential communications and documents created during the legislative process of preparing the redistricting maps that ultimately were enacted as Act 43 and Act 44.

C. The Legislature did not Waive Legislative Privilege Merely Because They Retained an Expert to Assist in their Legislative Duties.

Notwithstanding the existence of privilege, Judge Stadtmueller broadly concluded that, because an outside consultant was brought into the otherwise-private legislative process, any applicable legislative privilege was waived. Respectfully, a careful reading of the relevant legal authority does not support such a result, nor do any legitimate policy justifications.

“Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege.” *International Travelers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215, 222 (7th Cir. 1981). It cannot fairly be said that the Legislature waived its legislative privilege by including Mr. Handrick in the process when the primary authority supporting the

Orders' finding of waiver was decided months after the redistricting process had been completed and the resulting maps had been enacted into law.

In concluding that the Legislature waived legislative privilege by involving Mr. Handrick in the legislative process, the Orders relied almost exclusively on *Fair Map*. (Dkt. # 74). With scant analysis, the court in *Fair Map* relied on *ACORN I*, for the proposition that, "to the extent that Non-Parties relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege as to those documents." *Fair Map*, 2011 U.S. Dist. LEXIS 117656, *35. However, with all due respect to the court in *Fair Map*, it badly misinterpreted the holding of the authority on which it relied.

In fact, in *ACORN I*, the court concluded that legislative privilege *did apply* to certain communications between a village board and a retained zoning consultant. Specifically, the magistrate judge found that the consultant's submission of a report to the board was the "starting point of the Board's [legislative] deliberations," and any communications between the board and consultants "subsequent to that event that reflect a legislator's deliberation or motivation are . . . covered by legislative privilege." *Id.*, *19. On the other hand, the magistrate judge concluded that the legislative privilege did not apply to communications with the consultant that occurred *before* the board had begun their deliberations regarding the zoning legislation at issue. *Id.*, **18-19. In other words, the deciding factor as to whether the legislative privilege existed in *ACORN I* was not the presence or absence of an outside consultant in the legislative process but, instead, whether the communications at issue were made within or outside of the legislative process. The existence or waiver of the legislative privilege depended on the *process* more than on the *person*.

This holding and analysis were confirmed in a subsequent order by the district court, which declined to set aside the magistrate judge's order. The district court concluded that the magistrate judge had properly held that "the [legislative] privilege extends to a consulting firm retained by Garden City as a land use/zoning specialist" *ACORN v. County of Nassau*, 2009 U.S. Dist. LEXIS 82405, *4 (E.D. N.Y., Sept. 10, 2009) ("*ACORN II*"). Indeed, in direct contrast to Judge Stadtmueller's ruling, the court concluded that the legislative privilege applied to the consulting firm specifically *because* the firm was retained as "legislative consultants." *Id.*, *9 (the consulting firm "could invoke the privilege, because in their work on the Social Services re-zoning project, they acted as legislative consultants").

The court recognized why the legislative privilege *must* apply to legislative consultants: "Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege." *Id.*, *24. **"To hold otherwise . . . would impair the legislative function by requiring [legislators] to exclude their own retained experts from the critical legislative conversations about the precise issues the experts were hired to address."** *Id.* (emphasis added).

The Arizona court of appeals has reached the same conclusion, holding that **"a legislator may invoke the legislative privilege to shield from inquiry the acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator."**⁴ *Arizona Indep. Redistricting Comm'n v. Fields*, 75

⁴ Notably, although the court in *Fields* found that waiver of the expert's privilege existed, that ruling was based on the fact that the expert in question was designated as a *testifying* expert by the party retaining him, not on the fact that he was not a legislator. *Id.* at 1102. The court noted that waiver could be avoided by not designating its pre-litigation consultants as *testifying*

P.3d 1088, 1097–98 (Ariz. Ct. App. 2003)⁵ (emphasis added) (relying on *Gravel v. United States*, 408 U.S. 606, 618–23 (1972)).

In other words, the court in *ACORN* did not conclude, as the court in *Fair Map* read it (and as this court read *Fair Map* to do), that any involvement from an outside consultant works as an absolute, uninhibited waiver of the legislative privilege. In fact, the court concluded that the inclusion of the consultant did not, by itself, justify a finding of waiver at all. Instead, the court looked to the purpose and timing of the communications and whether the communications were legitimately part of the legislative process. Communications with outside experts that were legitimately part of the legislative process were shielded from discovery. In short, in relying on *ACORN* to conclude that the legislative privilege was waived as to any “reports or recommendations generated by outside consultants,” *Fair Map* misapplied *ACORN*, and the Orders herer extended *Fair Map*’s misapplication even further.

The *ACORN* courts’ rulings only make sense. A Legislature must be allowed to bring in experts and legal counsel – especially on an issue so complex and rife with constitutional pitfalls as decennial redistricting – to ensure that they properly perform their functions. Acting in such a prudent fashion should not result in a waiver of the legislative privilege that would have shielded their deliberations had the Legislature not retained Mr. Handrick. *See ACORN I, supra; ACORN II, supra; Fields*, 75 P.3d at 1097-98.

The Orders’ contrary conclusion appears to be based on the premise that the Legislature involved Mr. Handrick in an effort to create a privilege, and thereby cloak from the public eye, matters that otherwise would have been visible to the citizens of Wisconsin. (Dkt. # 82 at 5).

experts. *Id.* at 1102. In other words, the court confirmed the validity of the work-product privilege that the Legislature raised to shield Mr. Handrick from discovery.

⁵ Subsequent appeal after remand was vacated on other grounds, *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d 676 (Ariz. 2009).

Respectfully, such an assumption is incorrect. Legislatures almost without exception deliberate legislation in private during the drafting process before introducing a bill and holding public hearings. *See Fair Map*, 2011 U.S. Dist. LEXIS 117656, *30 (noting that the law at issue was negotiated in private and debated in public). Yet, conducting such deliberations in private are not considered an affront to open government. In fact, it is the recognition of the importance of such private deliberations that justifies the existence of the legislative privilege in the first place.⁶ *See id.*

The Legislature did not attempt to use Mr. Handrick to attempt to seal from the public that which otherwise would have been open; indeed, the Legislature did not need to retain Mr. Handrick in order to privately deliberate Acts 43 and 44. The initial drafting process was properly closed in the first place, and the Legislature utilized Mr. Handrick's expertise to assist in fulfilling their legislative duties in accordance with the law.⁷ *See ACORN II*, 2009 U.S. Dist. LEXIS 82405, *24.

⁶ The court in *Fair Map* analogized the legislative privilege to the judicial privilege. 2011 U.S. Dist. LEXIS 117656, **30–32 (“[T]he legislature is not unlike other branches of government. As noted by the Third Circuit, a ‘legislator’s need for confidentiality is similar to the need for confidentiality in communications between judges . . .’” (*In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987))). The fact that drafts of judicial opinions, bench memos, and pre-decision discussions between judges and their clerks are not subject to disclosure does not impair the transparency of judiciary; neither does the legislative privilege undercut the transparency of the legislature. Rather, the legislative privilege promotes candor between legislators their advisors similar to the candor that judges enjoy when speaking amongst themselves and with their law clerks. This candor promotes—rather than undercuts—good government.

⁷ In this regard, Mr. Handrick was not merely a “knowledgeable outsider” such as a lobbyist, to whom some courts have refused to extend a legislative privilege. To the contrary, the only (and undisputed) evidence in the record shows that he was specifically retained to assist legal counsel in counsel’s provision of legal services and to assist in the legislative map-creating function. (Dkt. # 64, ¶ 3). In some respects, Mr. Handrick was effectively a short-term legislative staffer. The fact that Mr. Handrick may sometimes act as a lobbyist does not compel a conclusion that he acted in such a capacity here. Indeed, Mr. Handrick could not have been acting in a lobbying capacity, as he was, as the court concluded, retained by the Legislature. Legislatures do not retain lobbyists to lobby themselves.

Respectfully, this Court should conclude that any acts or communications of Mr. Handrick that “would be privileged legislative conduct if personally performed” by the Legislature are privileged, and refuse to allow discovery into those areas.

III. The Orders Incorrectly Determined That the Work Product Doctrine Did Not Apply to Mr. Handrick.

Federal Rule of Civil Procedure 26(b)(3)(A) states:

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Further, Federal Rule of Civil Procedure 26(b)(4)(D) states:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

The touchstone for both of these provisions is the “anticipation of litigation.”

Here, the engagement letter states on its face “potential litigation.” (Dkt. # 78, Ex. 1).

The December 20, 2011 Order expresses unease in permitting a legislature to shield work-product from discovery because a “Legislature can always anticipate litigation.” The Legislature understands the December 20, 2011 Order’s concern; however, the redistricting legislation was not a run-of-the-mill legislative act. Each of the last three redistricting efforts were subject to litigation, and all involved understood legal challenge to be, essentially, a certainty. Indeed, Paragraph 18 of plaintiffs’ original complaint states:

Article IV, section 3, of the Wisconsin Constitution gives the legislature the primary responsibility for enacting a constitutionally valid plan for the state’s legislative districts.

a. For the last three decades, however, the legislature has not met that responsibility. ***Instead, the judicial branch at least initially has established district boundaries to ensure the constitutional guarantees for citizens and voters.***

(Dkt. # 1, ¶ 18). As further illustration of how unique Acts 43 and 44 are, this suit was filed *before* the Legislature even enacted Acts 43 and 44. This lawsuit was preemptively filed “in anticipation of legislation.”

In sum, permitting work-product protection in this case does not mean that the communications of all future consultants involved in the legislative process would be subject to the work-product protection.

IV. This Court Should Stay the Orders as to Privilege Pending Final Determination by This Court.

The Legislature requests that this Court stay the effect of Judge Stadtmueller’s orders, insofar as the privilege conclusions are concerned, pending the full Court’s resolution of this motion. Absent a stay, review will be meaningless, as witnesses could be compelled to provide privileged testimony and materials that cannot be undone.

CONCLUSION

For the foregoing reasons, the Legislature asks this Court to order that any acts or communications by Mr. Handrick that would be privileged if personally performed by the Legislature should be privileged and shielded from discovery; and any communications that Mr. Handrick had with legal counsel related to legal counsel’s provision of legal services to the Legislature be deemed privileged and shielded from discovery.

Dated this 23rd day of December, 2011.

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